

UNITED STATES COURT OF APPEALS July 30, 2013

TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

JOSEPH EUGENE GENTRY,

Petitioner-Appellant,

v.

DAVID PARKER,

Respondent-Appellee.

No. 13-5018

(N.D. of Okla.)

(D.C. No. 4:11-CV-00795-GKF-FHM)

ORDER DISMISSING FOR LACK OF JURISDICTION*

Before **TYMKOVICH, ANDERSON**, and **BACHARACH**, Circuit Judges.

Joseph Gentry, an Oklahoma state prisoner, seeks a certificate of appealability (COA) to enable him to appeal the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We conclude we lack jurisdiction because Gentry failed to timely file a notice of appeal. We therefore deny the application for a COA as moot and dismiss this appeal.

The district court disposed of Gentry's § 2254 petition on December 21, 2012, thus starting the thirty-day clock in which to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A). But Gentry filed a timely motion to reconsider with the

* This order is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

district court. The district court construed that motion as one to alter or amend the judgment and denied it on January 15, 2013, restarting the thirty-day notice-of-appeal clock. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Gentry was therefore required to file his notice of appeal no later than February 14, 2013. “A timely notice of appeal is both mandatory and jurisdictional.” *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 886 (10th Cir. 2011) (internal quotation marks omitted).

Gentry dated his notice of appeal February 12, 2013, but the district court did not receive it until February 19, 2013. Nonetheless, Gentry may receive the benefit of the prison mailbox rule—we will consider his notice of appeal timely filed if it was “deposited in the [prison’s] internal mail system on or before the last day for filing.” Fed. R. App. P. 4(c)(1). The clerk of court therefore ordered Gentry to provide proof that he deposited his notice of appeal in the prison mail system on or before February 14.¹

Gentry received seventy-four days to respond (the result of moving for and receiving two extensions). He then filed a declaration stating that mental health problems impair his memory and that he “cannot remember what date that [the notice of appeal] got actually mailed.” Response at 6 (filed May 6, 2013). The clerk referred the timeliness question to this panel.

¹ The district court clerk failed to docket the envelope in which Gentry’s notice arrived—which would presumably show a postmark with a mailing date.

We conclude Gentry has not established that he placed his notice of appeal in the prison mail system by February 14. In the district court, a similar question arose: whether Gentry timely placed his § 2254 petition in the prison mail system. The state produced prison mail logs as evidence that Gentry did not timely deposit his petition in the prison mail system.² Here, Gentry had seventy-four days to obtain and produce the relevant prison mail logs but failed to do so. Given such readily available evidence and sufficient time to gather it, Gentry may not rest on lack of memory.

Gentry's application for a COA is DENIED as moot and this appeal is DISMISSED for lack of jurisdiction.

ENTERED FOR THE COURT

Timothy M. Tymkovich
Circuit Judge

² The district court agreed that Gentry did not timely file his petition and dismissed it on those grounds. Given our disposition, we need not decide whether the district court reached the correct conclusion.